



File Code: 1570
15-02-00-0043-218B
Date: March 23, 2015

Mark Pearson
560 Clear View Road
Durango, CO 81301

Dear Mr. Pearson:

On January 3, 2015 you filed an Objection to the Village at Wolf Creek Access project on the Rio Grande National Forest. The legal notice for this project was published in the Valley Courier on November 21, 2014, which initiated the 45-day objection filing period. Your objection was timely and your objection to the Final Environmental Impact Statement (FEIS), Draft Record of Decision (DROD), and project record were reviewed in accordance with 36 Code of Federal Regulations (CFR) 218. Your objection was combined with the objections of other individuals. My written response to your objections, as required by 36 CFR 218.11(b)(1), can be found below.

OVERVIEW OF PROJECT

Purpose and Need: The Purpose and Need for Action is to allow the Leavell-McCombs Joint Venture (LMJV) to access its property to secure reasonable use and enjoyment thereof as provided by the Alaska National Interest Lands Conservation Act (ANILCA) and Forest Service regulations, while minimizing environmental effects to natural resources within the project area. The legal entitlement is defined by ANILCA and Forest Service regulations as a right of access to non-Federal land within the boundaries of the National Forest System (NFS).

Alternatives: Three alternatives were analyzed in detail in the FEIS, including:

- **Alternative 1: No action.** Under this alternative there would be no additional road access provided to the ±288-acre private land inholding.
- **Alternative 2: Proposed Action / Selected Alternative:** The project, as proposed in the DROD, would authorize a land exchange between the United States and the LMJV to accommodate year round access to the private inholding. The LMJV would convey approximately 177 acres of privately held land to the Rio Grande NF in exchange for approximately 205 acres of NFS land managed by the Rio Grande NF.
- **Alternative 3: ANILCA Road Access:** Alternative 3 was designed to fulfill the Forest Service's obligations under ANILCA by providing an access road across NFS lands between Hwy 160 on the north and the private land inholding on the south. The Tranquility Road would also be extended east ±529 linear feet across NFS lands to provide limited, seasonal access to the inholding.



RESPONSE TO ISSUES & SUGGESTED REMEDIES

The objections raised the following issues/allegations:

Introduction Issue: Objector alleges the USFS violates 36 CFR 254.3(b)(2)(1) and land exchanges should be approved only when the resource values and value of the public objectives served by acquisition of the non-Federal land exceed those of the Federal lands, and this clearly is not the case. It is not in the public interest to convey Federal lands where there will be a degradation of scenery, an increase in habitat fragmentation, decreased connectivity, degradation of the Wolf Creek Pass Lynx Linkage Corridor, and loss of resource values whose abandonment plainly is in not in conformity with land exchange policy or the climate change resilience policy.

Introduction Response: The objector failed to raise the issue regarding scenery in comments previously submitted during a public comment period and the issue is not based on new information (36 CFR 218.8(c)).

Land exchanges are by definition, tradeoff decisions. As part of any land exchange decision, the authorized officer may complete an exchange only after completing a public interest determination. Under 36 CFR 254.3, there are factors that the authorized officer must consider to determine the public interest as listed on page 24 of the DROD. The authorized officer did consider these factors, and the findings and supporting rationale are documented and made a part of the administrative record. The DROD noted in the public interest determination that there are negative effects, but they have been fully disclosed. With regard to issues raised by the objector, there are effects associated with lynx habitat and climate change. All of these issues are discussed throughout the FEIS and Appendices. The DROD also notes (as required in section (ii) of the public interest determination) that the intended use of the non-Federal lands, to be incorporated into the existing ski area, will not conflict with the established management objectives on adjacent Federal lands. The authorized officer has made a public interest determination fully supported by the project record, and there is no violation of 36 CFR 254.3.

Exchanges are then further evaluated under NEPA, and the decision must include a public interest determination that meets 36 CFR 254.2. The Forest Service discusses the public interest determination as required at 36 CFR 254.3(b)(1) in the DROD pp. 24-25. Each of the following resource values and public considerations are also discussed throughout the FEIS, Response to Comments and specialist reports. Each value/consideration and their specific references are detailed as follows:

- Development would be moved further from Ski Area, thus potentially reducing some of the expressed recreational conflicts.

The FEIS addresses the consolidation of the ski area under Table 2.6.2 on p. 2-16. The DROD at page 7 evaluates the exchange meeting Forest Plan Guidelines as it relates to lands primarily for value for recreation purposes. The lower half of the two chairlifts and numerous ski trails are located on the non-Federal parcel. The Forest responded to multiple comments regarding public interest included in the Feasibility Analysis and DROD discussing the movement of the development further from the ski area to reduce recreation conflicts in Appendix I, Section 6.0, 03 Responses, pp. 81-83.



- Net gain of wetlands to be acquired and protected by Rio Grande NF.

Document Name	Location in Record/Document	Relevance
DROD Record # 82001	Decision Rationale, Item 7 Public Interest Determination, p. 25	Documents that land exchange would result in Forest Service acquisition of 52 acres of riparian wetlands, of which 24 acres are classified as fens, 11,565 linear feet of perennial streams, and 7,338 linear feet of intermittent streams.
FEIS Vol. 1 Record # 72001	Section 2.6.2 Summary of Indirect Environmental Consequences of Low, Moderate and Maximum Density Development Concepts, Table 2.6-2, p 2-15	Documents net effect to NFS (gain) of 40.4 acres of wetlands, 22.7 acres of fens, 8,641 linear feet of perennial streams, 6,092 linear feet of intermittent streams, springs (8), and the net loss of 1.1 acres of pond habitat.
FEIS Vol. 1 Record # 72001	Wetland Section 4.7.1.2.1, p. 4-88	Documents that the direct effect of the land exchange would result in a net gain of wetlands, fens, springs, and streams.
FEIS Vol. 2, Appendix I Record # 72002	Section 6.0 Comment Summaries & Responses, 12 Wetlands, Response 22, p. 126	Documents that land exchange would result in net gain of wetlands.
Feasibility Analysis Record # 11002	Public Interest Determination, p. 14	Documents that land exchange would result in a net gain in wetlands and streams.

The Rio Grande National Forest Land and Resource Management Plan Land Adjustments Forest Standards and Guidelines direct that the Forest consider acquiring lands with important or unique resources such as wetlands. Both the Federal and non-Federal parcels contain riparian wetlands, some of which are classified as fens, and perennial and intermittent streams. In addition, the non-Federal parcel has eight springs. The Federal parcel also has a one-acre pond. Through the exchange, the Forest Service will acquire approximately 52 acres of riparian wetlands which include roughly 24 acres of fens (the highest quality of wetlands), eight springs, 11,565 linear feet of perennial streams, and 7,338 linear feet of intermittent streams, while giving up ownership of roughly 12 acres of riparian wetlands which include one acre of fens, a one-acre pond, 2,924 linear feet of perennial streams, and 1,246 linear feet of intermittent streams. The Rio Grande NF will have a net gain of roughly 40 acres of riparian wetlands, including the 23 acres of fens, eight springs, 8,641 linear feet of perennial streams, and 6,092 linear feet of intermittent streams, and a net loss of a one acre pond.



The acquired wetlands, streams and springs, as a part of the Rio Grande NF, would be managed and protected in accordance with the Forest Plan's forest-wide objectives, standards and guidelines. The EPA September 28, 2012 comment letter (CL1) on the DEIS states, "The EPA supports the net benefit to wetlands resulting from the land exchange since critical wetland complexes current under private ownership will become Federal land and, therefore, afforded protection under Executive Order 11990, Protection of Wetlands."

- There would be no loss of viability across the Forest for Forest Service (Rocky Mountain Region) Sensitive Species and Management Indicator Species (MIS).

Document Name	Location in Record/Document	Relevance
FEIS Vol. 1 Record # 72001	Section 2.6.2, Table 2.6-2 Summary Comparison of Direct Effects of Land Ownership Changes under Alternative 2 – Land Exchange, p. 2-15 Table 2.6-3.9 Summary of Indirect Environmental Consequences of Development Concepts – Wildlife, p.. 2-32	Summarizes direct and indirect effects of land exchange on Rocky Mountain Region Sensitive Species and MIS.
FEIS Vol. 1 Record # 72001	Section 4.9.1.2.2 Forest Service Rocky Mountain Region Sensitive Species, pp. 4-124 to 4-128 Section 4.9.1.2.3 Management Indicator Species, pp. 4-128 to 4-129	Documents and discusses direct and indirect effects to Rocky Mountain Region Species and MIS.
FEIS Vol. 2, Appendix I Record # 72002	Section 6.0 Comment Summaries Responses, 14 Wildlife, Response 18, p. 136	Discusses impacts to Rocky Mountain Region Species and MIS.
Wildlife BE Record # 51215	Section 7.0 Rocky Mountain Region Sensitive Species Determination Summary, p. 76 Section 8.0 MIS, Summaries of Effect, pp. 90, 99, 106, 111, 118, 123, 132	Discuss impacts to Rocky Mountain Region Species and MIS.

Determinations for Rocky Mountain Region Sensitive Species range from "No impact" to "May impact individuals but not likely to result in a loss of viability on the planning area, nor cause a trend to Federal listing or a loss of species viability rangewide." Indirect and cumulative effects to all MIS except the Rocky Mountain elk would be insignificant and discountable on the species forest-wide population, trend, or habitat distribution. Indirect and cumulative effects for Rocky Mountain elk



would be appreciable, but would be unlikely to measurably affect the population, trend or habitat distribution across the Rio Grande NF.

- There are both positive and negative effects associated with land exchange. Both positive and negative effects have been fully disclosed.

Table 2.6-2 summarizes the direct effects of the land exchange, which include a net loss of 28 acres of NFS lands; a net increase in perennial and intermittent streams, wetlands, fens, and springs; net gains and loss of habitat types; net loss of primary lynx habitat.; net gain in southwestern willow flycatcher habitat; net gain in Rocky Mountain Region Sensitive Species and MIS high altitude riparian habitat, but a net loss of spruce-fir forest habitat; and the ability to consolidate existing ski area operations as per the 1996 Forest Plan and eliminate the need for ski easements.

Table 2.6-3 provides a summary of indirect effects of the Maximum Density Development Concept for Alternative 2, the Land Exchange. Indirect effects include potential impacts to the natural environment. However, mitigations required by local, state and Federal agencies would regulate impacts to these privately owned resources, reduce the extent of the impacts, and require mitigations for impacts. Various sections of the FEIS identify potential mitigations for impacts to groundwater, soils and wetlands. Habitat for Canada lynx would be affected and the determination for lynx is “may affect, likely to adversely affect.” The Biological Opinion issued an incidental take statement authorizing a take specifically for the expected the mortality of lynx being hit on the highway. The BO provides Conservation Measures are part of the proposed action to mitigate the indirect effects of the project on lynx. There will be a net habitat loss of lynx habitat in the exchange. The southwestern willow flycatcher BO determinations is “may affect, not likely to adversely affect.”

Determinations for Rocky Mountain Region Sensitive Species range from “No impact” to “May impact individuals but not likely to result in a loss of viability on the planning area, nor cause a trend to Federal listing or a loss of species viability rangewide.” Indirect and cumulative effects to all MIS except the Rocky Mountain elk would be insignificant and discountable on the species forest-wide population, trend, or habitat distribution. Indirect and cumulative effects for Rocky Mountain elk would be appreciable but would be unlikely to measurably affect the population, trend or habitat distribution across the Rio Grande NF.

- Wolf Creek Ski Area (WCSA) supports the proposed land exchange, in contrast to the development plan approved by Mineral County in 2003.

A letter submitted by WCSA President/CEO Davey Pitcher on October 10, 2012, states that WCSA supports Alternative 2 (Land Exchange Alternative) for the following reasons:

- The realigned property boundaries will protect the ski heritage of WCSA;
- Wolf Creek believes that moving the current boundary away from the Alberta Park wetlands complex will be beneficial to water users of the San Luis Valley and the ecosystem as a whole; and,
- If the USFS proceeds with the land exchange alternative, the private land will become contiguous with the State Highway System (U.S. Highway 160), which would relieve the Forest Service from administering road development.



- The Intended uses of conveyed Federal lands will not substantially conflict with Management Objectives on adjacent NFS lands managed as 8.22 Ski-Based Resorts. 36 CFR 254.3(f) states that lands acquired by exchange that are located within areas having an administrative designation established through the land management planning process shall automatically become part of the area within which they are located, without further action by the Forest Service, and shall be managed in accordance with the laws, rules, regulations, and land and resource management plan applicable to such area.

The lower half of two chairlifts and numerous ski trails are located on the non-Federal exchange parcel to be acquired by the Rio Grande NF. Consistent with 36 CFR 254.3(f), the conveyed non-Federal land would result in the parcel becoming part of Management Area 8.22 Ski-Based Resorts and inclusion in the ski area boundary. As discussed in Section 1.9 of the FEIS, the exchange would consolidate existing ski area operations, eliminate the need for easements, increase the acreage of Federal land available for skiing, reduce potential conflicts, and generally benefit NFS developed recreation opportunities. The FEIS at section 3.10 and 3.11, p.3-109 discusses Management Area 8.22. The DROD Decision Rationale Item 1 discusses Forest Plan Direction on pp. 7-8, regarding the benefits of Federal ownership of the non-Federal exchange parcel.

The Federal lands proposed for conveyance would be used to develop a residential village adjacent to the WCSA. Associated facilities such as trails, lifts, and lodges are included. This is an area of concentrated use.

- The exchange would result in an increase in tourism, which would foster economic opportunity, growth and prosperity, increase employment and individual income within the three-county analysis area, and generate public revenue through property and sales taxes for Mineral County and its school district.

The FEIS provided a summary and discussion of development concepts in Table 2.6-3.13, pp. 2-40 to 2-46. Under Section 4.13.3.2.3 the Maximum Density Development Concept, pp.4-213-4-225 there is discussion of the fiscal impacts on employment, individual prosperity and public revenues. These are as summarized below.

Tourism: The completed project is expected to attract over 830,000 person/nights on an annual basis; an average of 2,273 visitors on every night during a year. At completion (Year 2044), Village visitors would generate over \$151 million in annual expenditures, inside and outside the Village. This level of expenditures would be expected to continue in future years.

Employment Status: During the 30-year phase-in period, the project is projected to generate a cumulative total of over 8,700 construction FTEs, an average of 290 FTEs per year. Upon completion in year 2044, ongoing Village operations would generate a total of 2,100 annual FTEs; these jobs would continue into the future for as long as the Village maintains operations.

Individual Prosperity: Construction of this development concept is expected to cumulatively generate a total of \$448.5 million in labor income, including \$251.7 million in direct income and \$196.9 in indirect/induced labor income. Project operations at the point of completion (2044) would generate \$50.2 million annually in labor income, including \$29.6 million in direct income and \$20.5 million in indirect/induced labor income. Total personal income in the Analysis Area in 2009 was



\$797.9 million; during the peak year (2043), this development concept would increase this value by 5.7%.

Public Revenues and Fiscal Impact: Using current tax rates, annual property tax collections at the time of completion in 2044, it is expected they would total \$5.29 million in Creede Consolidated District taxes and \$6.17 million in Mineral County taxes. These values would be expected to continue into the future. Cumulative sales tax revenues generated by construction would be \$12,894,369. Upon completion, ongoing operation and unit visitor expenditures would generate approximately \$3,774,000 in sales taxes on an annual basis. At project completion, projected visitor expenditures in the Village alone would generate an estimated \$2,062,000 in sales tax for Mineral County. Approximately \$1,712,000 in sales taxes – annually – would be generated outside the resort, likely in Archuleta and Rio Grande Counties.

- The land exchange meets equal value requirements of 36 CFR 254.3

36 CFR 254.3 (C) Except as provided in § 254.11 of this subpart, lands or interests to be exchanged must be of equal value or equalized in accordance with the methods set forth in § 254.12 of this subpart. An exchange of lands or interests shall be based on market value as determined by the Secretary through appraisal(s), through bargaining based on appraisal(s), through other acceptable and commonly recognized methods of determining market value, or through arbitration.

Exhibit 7A found at: <http://friendsofwolfcreek.org/wolf-creek-access-project-administrative-objection-exhibits> is a copy of the Supplemental Report to the Appraisal of non-Federal land with a report date of September 12, 2014. The instructions contained in the RFQ state, in part: The contract appraiser shall make a detailed field inspection of the subject property and conduct as many investigations and studies as are necessary to derive sound conclusions. The development of appraisals for the Federal and non-Federal parcels proposed for exchange and the review of those appraisals followed a structured process, one that complied with applicable law, policy, and standards. Specifically, the appraisals were prepared in compliance with 1) 36 CFR 254, Subpart A, 2) the current edition of the Uniform Standards of Professional Appraisal Practice, 3) the current edition of the Uniform Appraisal Standards for Federal Land Acquisitions, and 4) USDA Forest Service Statement of Work written specifically for the assignment.

Differences between the subject property and parcels that sold were identified by the contract appraiser to be: property rights conveyed, financing terms, conditions of sale, market conditions (time), location, ski area influence, access, adjacent land uses, utility availability, natural features, topography, views/exposure, property size, and zoning/land use. By considering these differences within the Sales Comparison Approach, defensible conclusions were reached. Sale transactions used in the Sales Comparison Approach are not synonymous with similarly situated properties as defined in ANILCA. Document 11006-2013090901 provides direction for the Federal parcel appraisal.

While the two appraisals, one each for the Federal and non-Federal parcels, both with effective dates of value (Reference Document number 11008-20140915) of September 1, 2014, were completed to ensure compliance with 36 CFR 254, they were excluded from NEPA analysis; conclusions reached in the appraisal process were considered in the decision. Appraisals and the review reports that approved them for agency use are used by the deciding officer when making decision as a requirement of 36 CFR 254.3(c), but are developed parallel and external to NEPA process.



Comments received on appraisal during scoping were provided to contract appraiser, and considered in the updated appraisal report as per the supplemental appraisal instructions. This was discussed in the response to comments in Appendix I of the FEIS, Section 6.0, p.80.

The objector refers to the “National Roadmap for Responding to Climate Change” (USDA Forest Service, July 2010). As explained in the FEIS (Vol. 2, Appendix 1, p. 114) in response to the objector on a similar DEIS comment, the National Roadmap for Responding to Climate Change is a document that directs agency units to complete the climate change scorecard. It is not law, regulation, or policy, and therefore cannot be violated. The National Environmental Policy Act (NEPA) does not specifically require analysis of how environmental factors, such as global climate change, might impact a proposed action (FEIS page 3-33).

Issue 1: The objector alleges the USFS will violate NFMA because the land exchange violates Forest Plan standards for scenery management (scenic resource standard 2), which states *“Management activities which are inconsistent with the Scenic Integrity Objective will be avoided unless a decision is made to change the Scenic Integrity Level.”*

Issue 1 Response: The objector failed to raise the issue in comments previously submitted during a public comment period and the issue is not based on new information (36 CFR 218.8(c)).

Issue 2: The objector alleges the USFS violates the APA because the decision strips the scenic easement in contradiction to conditions deemed critical to authorization of the 1987 land exchange, which was to ensure consistency with Forest Plan standards for scenery.

Issue 2 Response: The objector failed to raise the issue in comments previously submitted during a public comment period and the issue is not based on new information (36 CFR 218.8(c)).

Issue 3: The objector alleges the USFS violates NEPA by conducting flawed visuals analysis, because the 48-foot building height used in the modeling would not apply to the newly created 205-acre parcel.

Issue 3 Response: The objector failed to raise the issue in comments previously submitted during a public comment period and the issue is not based on new information (36 CFR 218.8(c)).

Issue 4: The objector alleges the USFS violates NEPA because the proposed decision for the Wolf Creek Access Project does not meet the purpose and need of minimizing environmental impacts, including impacts to scenery, habitat fragmentation in the lynx linkage corridor, and impacts to fens and other wetlands. Objector alleges the No Action alternative best meets the purpose and need and public interests.

Issue 4 Response: The objector failed to raise the issue regarding scenery, scenic easement, and Forest Plan violations in comments previously submitted during a public comment period and the issue is not based on new information (36 CFR 218.8(c)); thus, they are not addressed. Issues upon which there were previous comments are addressed below.

The Forest Service did not violate NEPA or any other law, regulation, or policy. The claims/arguments made by the objector in Issue 4 are not supported by the record or other evidence.



As defined in 40 CFR 1508.8, environmental effects include: 1) direct effects, which are caused by the action and occur at the same time and place; and (2) indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Chapter 4 of the DEIS and FEIS includes detailed analysis of the direct, indirect and cumulative environmental effects of Alternatives 1, 2 and 3, including the Low, Moderate and Maximum development of the Village at Wolf Creek for Alternatives 2 and 3 (action alternatives). Most of the analysis deals with “indirect effects”, including development of the Village at Wolf Creek. Maximum development represents the “full development” scenario and was thoroughly analyzed in the FEIS for each action alternative.

The direct, indirect, and cumulative environmental impacts (including impacts to Canada lynx) of the project on the environment are analyzed in Chapter 4.9 of the FEIS. The U.S. Fish and Wildlife Service’s November 15, 2013, Biological Opinion found that the proposed action is not likely to jeopardize the continued existence of Canada lynx within the contiguous US distinct population segment. Through the section 7 consultation process under ESA, conservation measures (non-discretionary actions that are considered part of the proposed action) will be implemented to minimize impacts on Canada lynx.

As discussed in the FEIS, Section 1.10, ANILCA (and 36 CFR 251.110-114, Subpart D (Access to Non-Federal Lands)) defines the legal obligation of the Forest Service to provide the land owner with adequate access to its inholding to secure reasonable use and enjoyment thereof. The Rio Grande NF is considering the proposed action because of the requirements of ANILCA. As discussed in the DROD p. 11, in 2005, a state district court found that existing, seasonal access on NFSR 391 was inadequate for a year-round development of even the first phase of the then-proposed development. That decision was upheld in *Wolf Creek Ski Corp. v. Bd. of County Comm'rs of Mineral County*, 170 P.3d 821 (Colo.App. 2007). Historic access or rights of access are not adequate. 36 CFR 251.112(b). In consideration of the applicant’s request and the particular circumstances of the situation, including the purpose of the original land exchange, the Forest Service must ensure that it provides adequate access over National Forest System lands that will allow the use of the private land property within the reasonable range, pursuant to ANILCA.

Issues 5, 6, and 7: The objector alleges the USFS violates the APA because this decision cannot be based on a reinterpretation of the 1987 land exchange. The USFS cannot dismiss reconsideration of the 1987 land exchange and then eliminate the most critical element of the LEX, which is the scenic easement. The USFS insists that access for a commercial resort was always intended and the omission of that access was an oversight. This conclusion is not supported by the plain facts of the 1987 land exchange and subsequent deeds and legal documents.

The objector alleges the USFS violates APA because the 1987 land exchange was completed with awareness of accompanying rights of access well after enactment of ANILCA in 1980 and was deemed sufficient for reasonable use and enjoyment.

Issue 5, 6, and 7 Response: The objector failed to raise a portion of the issues (scenery, scenic easement, and alleged violations of Forest Plan standards) in comments previously submitted during a public comment period and the issue is not based on new information (36 CFR 218.8(c)). Other parts of Issues 5, 6, and 7 are addressed below.



The original purpose of the Forest Service in authorizing the land exchange that created this parcel was to facilitate commercial and residential development associated with the WCSA. The 1986 Environmental Assessment assumed development of a winter resort with 208 residential units, two restaurants, two day lodges and six retail shops. These assumptions made during the previous analysis and decision informed the Forest's determination of adequate access for the LMJV inholding.

The EIS evaluates the full range of environmental effects while meeting legal requirements of ANILCA. The alternative chosen meets the requirements of providing access for the reasonable use and enjoyment of the property, and represents the least impactful option to national forest management when compared to the other alternatives.

ANILCA is intended to ensure access to non-federally owned land within the boundaries of the National Forest System, to secure to the owner the reasonable use and enjoyment thereof, provided such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System. Adequate access to an inholding is defined by CFR as "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 CFR 251.111. Reasonable use and enjoyment of the lands is based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria. 36 CFR 251.114(a). After an extensive analysis, no property was found to be "similarly situated" to the LMJV inholding and therefore, "other relevant criteria" were considered as required by the regulation. Specifically, the original purpose of the Forest Service in authorizing the 1987 land exchange that created this parcel was to facilitate commercial and residential development associated with the WCSA. While access was not expressly granted at that time, ANILCA was in effect, and the development scenario disclosed in the 1987 exchange informed the Forest's determination of the reasonable use and enjoyment of the parcel.

Discussions of the 1987 Land Exchange and Decision Notice are found in: DROD, Section 8.0, folder 8.2: DROD, Decision Rationale, Project Record 1.4 Project Background; 1986 LEX Final EA, p. 19 (3-11), p. 48, p. 37 (4-11), pp. 164-168 (Appendix K) and 1986-09-29 Amended DN.

The 1986 Decision Notice for the Proposed Wolf Creek Land Exchange with Leavell Properties, Inc. signed on March 6, 1986, selected Alternative 1 to exchange 420 acres of federal land adjacent to the WCSA in exchange from 1631.38 acres of non-federal tracts and inholdings. The area is identified on a map in the final environmental analysis dated January 1986, on page 48. The figure shows that the 420 acres abutted Highway 160 within Section 4. Per Page 3-11 of the environmental analysis, access to the parcel is defined as "along U.S. Highway 160, through the WCSA parking long, and along a primary USFS access road (FS 391) that terminates at Alberta Lake."

On September 29, 1986, the original decision was amended. According to the Decision Notice, "the Federal Land Policy and Management Act of 1976 requires that the value of the non-Federal and Federal lands be equal, or if they are not equal, the values shall be equalized by the payment of money not to exceed 25 per centum of the value of the Federal land." To comply with FLPMA, the area of Federal land was reduced from 420 acres to 300 acres. A new map was issued as Page 3 of that document, showing the Federal parcel no longer abutted Highway 160, thus inadvertently eliminating access to the parcel from the public highway. Deeds and other recorded documents were



then issued based off of this decision, completing the exchange process, and creating a private inholding surrounded by Rio Grande NF.

Page 4-11 as listed in the final environmental analysis indicates that the proponent's tentative plans to build facilities such as housing units and commercial properties was considered during the "Physical Impacts" portion of the analysis. Reference is made to Appendix K which outlines the feasible impact of the select land development. Appendix K includes a Memorandum to Les Cahill from Tom Glass, RE: Development Assumptions, Wolf Creek Select Lands. Assumptions included 100 hotel rooms and 160 condominium units, based on the WCSA Master Plan. Restaurants and shops are also indicated, with an approximate 35 to 40 acres identified for building development. These assumptions made during the previous analysis and decision informed the Forest's determination of adequate access for the LMJV inholding.

The current draft decision is under review, and there is no requirement under law, regulation, or policy to justify past agency decisions such as the 1987 land exchange.

Issue 8: The objector alleges the USFS violates NEPA because the proposed decision for the Wolf Creek Access Project does not meet the purpose and need of minimizing environmental impacts. Specifically:

- i. The project will increase impacts to scenery by removing the scenic easement, degrading Scenic Integrity Objectives, and by violating Forest Plan standards for scenery.
- ii. The project will increase habitat fragmentation and decrease connectivity in a high, cold mountain environment in the Wolf Creek Pass lynx linkage corridor.
- iii. The USFS was not transparent because they did not document their rationale for trading fens and wetlands (an "irreplaceable" resource) out of public ownership in 1987, and why acquiring ownership now is considered a substantial environmental benefit.
- iv. The analysis supports the no action alternative to best meet purpose and need to minimize environmental impacts. The NEPA analysis finds seasonal access is widely applicable to similarly situated parcels and that no action best meets the interests of all parties and the public.

Relationship to Scoping and Formal Comment Period: This objector raised the issue of habitat fragmentation in a lynx corridor; referenced long lasting and irreversible impacts to the entire Southern Rocky Mountains; and that seasonal access sufficiently provides for reasonable use and enjoyment of the private parcel (CL60, dates 10.1.12). Objector did not previously raise concerns over scenery, scenic easement, and alleged violations of Forest Plan standards.

Issue 8 Response: The Forest Service did not violate NEPA or any other law, regulation, or policy. The claims/ arguments made by the objector above are not supported by the record or other evidence.

Scenery, the Scenic Easement, and Forest Plan violations ("i." above) are not addressed in this response because the objector did not specifically raise these issues in earlier comments.



- ii. As defined in 40 CFR 1508.8, environmental effects include: 1) direct effects, which are caused by the action and occur at the same time and place; and (2) indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Chapter 4 of the DEIS and FEIS includes detailed analysis of the direct, indirect and cumulative environmental effects of Alternatives 1, 2 and 3, including the Low, Moderate and Maximum development of the Village at Wolf Creek for Alternatives 2 and 3 (action alternatives). Most of the analysis deals with “indirect effects”, including development of the Village at Wolf Creek. Maximum development represents the “full development” scenario and was thoroughly analyzed in the FEIS for each action alternative.
The direct, indirect, and cumulative environmental impacts (including Canada lynx) of the project on the environment are analyzed in Chapter 4.9 of the FEIS. The U.S. Fish and Wildlife Service’s November 15, 2013, Biological Opinion found that the proposed action is not likely to jeopardize the continued existence of Canada lynx within the contiguous US distinct population segment. Through the section 7 consultation process under ESA, conservation measures (non-discretionary actions that are considered part of the proposed action) will be implemented to minimize impacts on Canada lynx.
- iii. The current draft decision is under review, and there is no requirement under law, regulation, or policy to justify past agency decisions such as the 1987 land exchange.
- iv. As discussed in the FEIS, Section 1.10, ANILCA (and 36 CFR 251.110-114, Subpart D (Access to Non-Federal Lands)) defines the legal obligation of the Forest Service to provide the land owner with adequate access to its inholding to secure reasonable use and enjoyment thereof. The Rio Grande NF is considering the proposed action because of the requirements of ANILCA. As discussed in the DROD p. 11, in 2005, a state district court found that existing, seasonal access on NFSR 391 was inadequate for a year-round development of even the first phase of the then-proposed development. That decision was upheld in *Wolf Creek Ski Corp. v. Bd. of County Comm'rs of Mineral County*, 170 P.3d 821 (Colo.App. 2007). Historic access or right of access are not adequate. 36 CFR 251.112(b) In consideration of the applicant’s request and the particular circumstances of the situation, including the purpose of the original land exchange, the Forest Service must ensure that it provides adequate access over National Forest System lands that will allow the use of the private land property within the reasonable range, pursuant to ANILCA.

Issue 9: The objector alleges the USFS violates the APA by appraising the project for one use (rural residential), but authorizing the exchange for a radically different use (resort).

Issue 9 Response: The appraisal was prepared to meet law, regulation, policy, and standards by a licensed professional, and went through a technical review process by the Regional Appraiser as per Forest Service policy.

The Forest Service discusses how appraisals are used as a requirement of FLPMA, and that value for Federal and non-Federal parcels are determined by appraisal in the FEIS at pp. 1-15-1-16, Section 1.8. The Forest Service responded to comments regarding appraisal highest and best use, and how appraisals are conducted. The Forest Service Exhibit 6 in the Project Analysis is a copy of the Supplemental Report to the Appraisal of non-Federal land with a report date of September 1, 2014. The instructions issued state in part the contract appraiser shall “...make a detailed field inspection of the subject property and conduct as many investigations and studies as are necessary to derive



sound conclusions.” The instructions note that the development approach should not be relied upon as the primary indicator of value when comparable sales are available with which to conclude the property’s market value and that if it is used the contract appraiser shall adhere to the UASFLA direction pertaining to this highly sensitive and complex method of valuation. The instructions do not direct a specific type of appraisal approach. Further, in the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA), Section B-8 titled Development Approach, the contract appraiser was instructed to comply with directs on page 45, first sentence of second paragraph: “When comparable sales are available with which to accurately estimate the property's market value, the development approach should not be relied upon as the primary indicator of value, as it is considerably more prone to error.”

Similarly situated properties under ANILA are not synonymous with sale transactions used in a Sales Comparison Approach. The valuation process is separate and distinct from the NEPA process, with findings from each used by the deciding officer. The development of appraisals for the Federal and non-Federal properties proposed for exchange, and the subsequent review of the appraisals by the Regional Appraiser, followed the process which complied with applicable law, policy, and appraisal standards.

Specifically, the appraisals were prepared in compliance with the current edition of the UASFLA and USPAP and the USDA Forest Service State of Work written specially for this assignment. The purpose of the appraisals is to provide an opinion of market value defined at 36 CFR 254, subpart A, 254.2. “Market value is defined as the most probable price in cash; or terms equivalent to cash, which lands, or interests in lands should bring in a competitive and open market.”

Appraisals must be completed to determine if the values of the parcels proposed for exchange are equal in value, or may be made equal in value with a cash equalization payment less than 25% of the value of the Federal parcel, as per the requirement of FLPMA, not NEPA.

When developing a Sales Comparison Approach properly, differences between the subject property and properties that have sold are considered. The contract appraiser determined that relevant elements of comparison were: property rights conveyed, financing terms, conditions of sale, market conditions (time), location, ski area influence, access, adjacent land uses, utility availability, natural features, topography, views/exposure, property size, and zoning/land use. By considering these differences in the two appraisals (one each for the Federal and non-Federal parcels and both with effective dates of value of September 1, 2014), validity of the two Sales Comparison Approaches was achieved.

The objection confuses appraisal and land valuation vocabulary with terms relating to ANILCA. It is important to separate these terms. Terms used to determine market value and the appraisal process are located in 36 CFR 254.9. Common terms used to determine market value during the appraisal process require definition of highest and best use, comparable property and description of legal access. These terms are not associated with the ANILCA determinations for reasonable use and enjoyment, similarly situated properties, or adequate access.

Issue 10: The objector alleges that USFS violates APA and NEPA for failing to evaluate other relevant criteria for assessing reasonable use and enjoyment of the property under ANILCA and for failing to allow public input on the criterion.



- i. LMJV and their consultants were aware of their development rights and interests in 1987. The 1987 access was deemed sufficient for the proponent's reasonable use and enjoyment of their property when LMJV took title to the property. Further action is not required.
- ii. The USFS has not adequately explained why new and improved access is now required. The 1987 exchange provided for reasonable use and enjoyment of the project under ANILCA at that time.
- iii. The USFS alleges that the intent and outcome of the 1987 exchange was to provide for development of a commercial resort, and that access was an oversight. The assertion that the 1987 exchange was intended to facilitate resort development is arbitrary and capricious because it is not supported by facts, deeds, and legal documents.
- iv. The FEIS does not discuss how one specific criterion was created (alleged intent of the 1987 exchange to facilitate resort development) that allows for the decision maker to override and ignore all the evidence regarding similarly situated inholdings.
- v. The public was not provided the opportunity to comment on the one criterion (intent of 1987 exchange to facilitate resort development), nor given the opportunity to suggest additional criteria.

Issue 10 Response: The original purpose of the Forest Service in authorizing the land exchange that created this parcel was to facilitate commercial and residential development associated with the WCSA. The 1986 Environmental Assessment assumed development of a winter resort with 208 residential units, two restaurants, two day lodges and six retail shops. These assumptions made during the previous analysis and decision informed the Forest's determination of adequate access for the LMJV inholding.

The FEIS evaluates the full range of environmental effects while meeting legal requirements of ANILCA. The alternative chosen meets the requirements of providing access for the reasonable use and enjoyment of the property, and represents the least impactful option to national forest management when compared to the other alternatives.

ANILCA is intended to ensure access to non-federally owned land within the boundaries of the National Forest System, to secure to the owner the reasonable use and enjoyment thereof, provided such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System. Adequate access to an inholding is defined by CFR as "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 CFR 251.111. Reasonable use and enjoyment of the lands is based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria. 36 CFR 251.114(a). After an extensive analysis, no property was found to be "similarly situated" to the LMJV inholding and therefore "other relevant criteria" were considered as required by the regulation. Specifically, the original purpose of the Forest Service in authorizing the 1986 land exchange that created this parcel was to facilitate commercial and residential development associated with the WCSA. While access was not expressly granted at that time, ANILCA was in effect and the development scenario disclosed in the 1987 exchange informed the Forest's determination of the reasonable use and enjoyment of the parcel.



ANILCA, Similarly Situated Lands, Adequate Access & Reasonable Use and Enjoyment are discussed in the following documents: FEIS Vol. 1, Page 1-17 thru 1-28, Section 1.10 in its entirety; FEIS Vol. 2, Appendix I, Section 6.0, 02 Purpose and Need, pp. 72-78; and DROD Section 3, Pages 11-22. Discussion of the 1987 Land Exchange is found in the Project Record 1.4 Project Background; 1986 LEX Final EA, p. 19 (3-11), p. 48, p. 37 (4-11), pp. 164-168 (Appendix K) and 1986-09-29 Amended DN. The FEIS section 1.10 provides a detailed analysis of ANILCA and Forest Service regulation, including the three fundamental concepts 1) similarly situated lands; 2) adequate access; and 3) reasonable use and enjoyment.

The 1986 Decision Notice for the Proposed Wolf Creek Land Exchange with Leavell Properties, Inc. signed on March 6, 1986, selected Alternative 1 to exchange 420 acres of federal land adjacent to the WCSA in exchange from 1631.38 acres of non-federal tracts and inholdings. The area is identified on a map in the final environmental analysis dated January 1986, on page 48. The figure shows that the 420 acres abutted Highway 160 within Section 4. Per Page 3-11 of the environmental analysis, access to the parcel is defined as “along U.S. Highway 160, through the WCSA parking lot, and along a primary USFS access road (FS 391) that terminates at Alberta Lake.”

On September 29, 1986, the original decision was amended. According to the Decision Notice, “the Federal Land Policy and Management Act of 1976 requires that the value of the non-Federal and Federal lands be equal, or if they are not equal, the values shall be equalized by the payment of money not to exceed 25 per centum of the value of the Federal land.” To comply with FLPMA, the area of Federal land was reduced from 420 acres to 300 acres. A new map was issued as Page 3 of that document, showing the Federal parcel no longer abutted Highway 160, thus inadvertently eliminating access to the parcel from the public highway. Deeds and other recorded documents were then issued based off of this decision, completing the exchange process, and creating a private inholding surrounded by Rio Grande NF.

Page 4-11 as listed in the final environmental analysis indicates that the proponent’s tentative plans to build facilities such as housing units and commercial properties was considered during the “Physical Impacts” portion of the analysis. Reference is made to Appendix K which outlines the feasible impact of the selected land development. Appendix K includes a Memorandum to Les Cahill from Tom Glass, RE: Development Assumptions, Wolf Creek Select Lands. Assumptions included 100 hotel rooms and 160 condominium units, based on the WCSA Master Plan. Restaurants and shops are also indicated, with an approximate 35 to 40 acres identified for building development. These assumptions (made during the previous analysis and decision) informed the Forest’s determination of adequate access for the LMJV inholding.

A thorough analysis of similarly situated inholdings was completed in the November 20, 2014 Record of Decision for Village at Wolf Creek Access Project. In addition, FEIS section 1.10 provides a detailed analysis of ANILCA and Forest Service regulation including the three fundamental concepts 1) similarly situated lands; 2) adequate access; and 3) reasonable use and enjoyment.

Adequate Access

“Adequate access” to an inholding is defined by CFR as “a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with



similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources.” 36 CFR 251.111. Furthermore: the authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria. 36 CFR 251.114(a)

Similarly Situated

The defining characteristics of LMJV’s inholding are its size, proximity to a snowplowed public road, and its proximity to an existing winter recreational development/attraction. The Rio Grande NF conducted a search for similarly situated non-Federal lands on the Divide Ranger District where access was sought to inholdings across NFS lands. Recognizing that the WCSA was the only existing winter recreational development on the Divide Ranger District, the RGNF began the search utilizing the two remaining important characteristics of the LMJV inholding to determine if any of the properties located on the Divide Ranger District were similarly situated. Although these two characteristics present important factors for determining similarly situated lands, further analysis was used to ensure a thorough evaluation. The two evaluation characteristics are as follows:

- Size of parcel
- Lands located within one mile of a snowplowed public road

The data shows that access has been requested and granted to a number of different private properties of varying sizes with a variety of uses; the Forest could not discern a clear pattern in the uses or sizes of the parcels with regard to reasonable use or mode of access. This overall process resulted in the determination that none of the 19 properties were similarly situated, and the Forest did not find that these properties compelled it to grant, or deny, snowplowed access to the LMJV parcel. Moreover, none of the 19 properties evaluated on the Divide Ranger District were in close proximity to a winter recreational development such as a ski area.

The Forest then expanded its search statewide within Colorado, but focused on inholdings associated with ski areas to determine whether commercial or residential uses were being conducted with or without snowplowed access. The Forest did identify 34 private inholdings associated with ski areas in Colorado.

While expanding its search statewide within Colorado, the Forest worked with Winter Sports managers in the Regional Office to identify additional potential similarly situated lands. Winter Sports managers in the Regional Office identified one additional potential property at a Utah ski area that had sought winter access, and this property was added to the evaluation. None of the 35 properties located in close proximity to a ski area were considered “similarly situated” for determining the reasonable use and enjoyment of the LMJV inholding.

Reasonable Use and Enjoyment

The history of the LMJV parcel shows how unique the property is. The original purpose of the Forest Service in authorizing the land exchange that created this parcel was to facilitate commercial and residential development associated with the WCSA. The 1986 Environmental Assessment assumed development of a winter resort with 208 residential units, two restaurants, two day lodges



and six retail shops. These assumptions made during the previous analysis and decision informed the Forest's determination of adequate access for the LMJV inholding.

Issue 11: The objector alleges the decision ignores and contradicts agency policy direction on maintaining and enhancing connectivity and fails to undertake a thorough climate change analysis.

Issue 11 Response: The FEIS and BA do provide an analysis of climate change and expected effects on lynx habitat in general. No violation of existing law, regulation, or policy regarding climate change analysis is evident.

The National Environmental Policy Act (NEPA) does not specifically require analysis of how environmental factors, such as global climate change, might impact a proposed action (FEIS page 3-33). The FEIS and BA note that, "...climate change could result in altered future forest composition that could benefit or adversely affect snowshoe hare and lynx habitat use" (FEIS page 3-76). The FEIS and BA discuss general expected effects of climate change on lynx, and specifically analyze expected changes in habitat function and connectivity under the various alternatives. Any of these changes could apply to Wolf Creek Pass Landscape Linkage (WCPLL), but identifying and analyzing any particular climate change scenario(s) would be pure speculation. Instead, the analysis concentrates on factors that have more certain predictability, including vegetation succession after insect infestation and wildfire, and effects of development, highway traffic, and highway crossings. The BA also mentions that lynx habitat in the project area represents a small fraction (0.48%) of the WCPLL, and nearly the entire remainder of the landscape linkage (98.7%) is on NFS lands that are largely undeveloped and available to accommodate lynx movements. The BA and FEIS point out that any development associated with Wolf Creek Village would be completed between 2020 and 2043, possibly before any measureable climate change effects that could be discerned from normal background variation would be realized in those montane and subalpine habitats within the lynx analysis area. Whether the permanent presence of the Village and associated effects would contribute to climate change impacts on habitat in the long term is not discussed, and arguably can't be usefully predicted.

Issue 12: The objector alleges the USFS violates the APA because the proposed decision is based in part on speculative and unsubstantiated claims. The USFS states that one of the reasons for approving the exchange is that the WCSA appears to support the exchange. However, the USFS did not substantiate this claim with evidence. The ROD must substantiate the rationale that the WCSA supports the proposed exchange or delete this statement from the listed reasons alleging the exchange is in the public interest.

Issue 12 Response: A scoping package was mailed to interested individuals, public agencies, and other organizations on April 13, 2011. Additionally, the DEIS for the Village at Wolf Creek Access Project was filed with the EPA and a Notice of Availability was published in the Federal Register Volume 77, No. 160 on Friday, August 17, 2012. The public comment period was extended for 45 days, August 17 to October 1, 2012. On October 4, 2012, a 15-day comment period extension was submitted to the Federal Register (published on October 12, 2012, Vol. 77, No. 198), which extended the comment period until October 16, 2012. On October 10, 2012 WCSA submitted a letter supporting Alternative 2 (Land Exchange Alternative) for the following three reasons:

- i. The realigned property boundaries will protect the ski heritage of WCSA.



- ii. Wolf Creek believes that moving the current boundary away from the Alberta Park wetlands complex will be beneficial to water users of the San Luis Valley and the ecosystem as a whole.
- iii. If the USFS proceeds with the land exchange alternative, the private land will become contiguous with the state highway system (U.S. Highway 160), which would relieve the Forest Service from administering road development

Issue 13: The objector alleges the draft decision violates APA because the decision is contrary to evidence before the agency.

- The decision ignores key aspects of the issue such as climate change impacts and agency policy directives for assessing climate change impacts. **(See Issue 11)**
- The decision runs counter to the evidence relative to habitat connectivity, fragmentation, and future increased importance of the lynx linkage areas in a changing climate. **(See Issue 11)**
- The decision runs counter to the evidence by appraising the property for one use (rural residential) but insisting on access for a different use (commercial resort), and abandoning the scenic easement that was crucial to the rationale behind the inholding's original creation. **(See Issue 9)**

CONCLUSION

Based on the review of your objection, the FEIS, and project record, I find no violation of law, regulation or policy. Your suggested remedies and recommendations are denied.

If you have any questions or concerns regarding this response, please contact Nancy Miller at 303-275-5373 or njmillier@fs.fed.us. This response is not subject to further administrative review by the Forest Service or the Department of Agriculture pursuant to 36 CFR 218.11(b)(2).

Sincerely,

/s/ Maribeth Gustafson

MARIBETH GUSTAFSON
Deputy Regional Forester
Reviewing Officer

cc: Dan Dallas, Adam Mendonca, Guy Blackwolf, Amy Waring

